Völkerrechtsblog
Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

SOVEREIGN DEBT SYMPOSIUM

Sovereign debt and international law

Or on the intricacies of theory and practice

NTINA TZOUVALA — 30 January, 2017

Events of historic proportions often feel anti-climactic. In March 2012, Greece, a developed capitalist state and a member of the Eurozone, engaged in the biggest debt restructuring venture to date, covering 200 billion euros (260 billion USD) and reducing the private debt burden by over 50%. The exchange was not purely voluntary, since the majority of bonds were subjected to Greek law and an amendment made the offer compulsory for all holders of such bonds, subject to approval by creditors holding two-thirds of outstanding principal. The triggering of these Collective Action Clauses (CACs) led the Determinations Committee of the International Swaps and Derivatives Association (ISDA) to declare a 'credit event'. Even though official pronouncements carefully avoided the word, much of the press and relevant literature saw this as the biggest default to date and at the same time as a confirmation of the unthinkable: EU member states could now default. Despite fears for immediate and uncontrollable contagion, the 'credit event' did not spread to other unstable economies of the European South, such as Portugal, Spain or Italy. After a brief period of optimism and successive years of harsh austerity the Greek sovereign debt stands at 176,9% of the GDP , while the Italian sovereign debt exceeds 132% of the GDP and Portugal's is just below 130%. The Eurozone might not have exploded (yet), but perceptions that the sovereign debt crisis was resolved, or that it is a uniquely Greek problem, appear distinctly misplaced. In this respect, the special edition of the Yale Journal of International Law on sovereign debt curated by Juan Pablo Bohoslavsky and Matthias Goldmann, is a highly topical and relevant intervention that approaches an urgent issue of global political economy from an international legal perspective and articulates specific – if incremental – proposals for the application of general principles of international law to sovereign debt restructuring.

Reconciling critical scholarship and responsible practice

It is worth reflecting on this project together with another recent publication by Isabel Feichtner, who reflected on the possibility to reconcile critical scholarship and responsible practice of international law. This might be a paradoxical anchor, since Bohoslavsky's and Goldmann's approach to the discipline is not immediately recognisable as 'critical'. In fact, in their co-authored piece, the two editors argue that '[i]t is the foremost task of legal practice and scholarship to make sense of this chaos and create a fairly consistent order by identifying and, where possible, codifying principles', which is arguably a fairly orthodox approach to the discipline. However, both contributions share

a profound discomfort with the contemporary state of global political economy, they show a clear appreciation for the role of international law in the construction of this problematic order, and favour the democratisation and social embeddedness of markets, instead of either their contemporary omnipotence or their transcendence. Indeed, Bohoslavksy's and Goldmann's article constitutes a good example of how 'institutional imagination and experimentation entails an entanglement of scholarship with practice as experimentation in practice feeds back into imagination in scholarship, and vice versa.' (Feichtner, p. 982) Constructing a progressivist narrative about the evolution of sovereign debt management they argue that debt sustainability, despite challenges, is now a principle of international law recalibrating the focus of restructuring toward a more balanced approach that takes into account the creditors' rights, but also the debtor state and the global public interest in financial stability.

The cost of focusing on international legal principles

However, the choice of focusing on international legal principles as the principal legal mechanisms for dealing with sovereign debt crisis comes at certain costs. First, the outlook of the project is too broad, and this carries specific conceptual and normative consequences. Different sovereign debt crises have different origins, unfold in diverse social and institutional settings (the Eurozone is a typical example of a highly peculiar legal, economic and political order), or are even just symptoms of diverging deeper economic pathologies and, therefore, subjecting their resolution to the same principles can be either unworkable or outright problematic from a progressive point of view. For example, after the 2012 restructuring and the successive 'rescue packages', Greece's debt is now mainly owned by public institutions. Therefore, even though the unsustainability of Greek debt is patently obvious, a write-down would validate the right-wing (and increasingly, racialised) narrative about hard-working Northerners bailing out the lazy South and, more importantly, would create an unnecessary tension between the interests of working people of the North and the South of the EU. Rather, proposals about a more pro-active role of the European Central Bank that would enable euro area states to pursue redistributive policies without nominally writing off debt strike a much better balance, to the benefit of all working people across Europe.

On the other hand, in cases where debt is primarily held by private creditors, the above considerations would arguably not apply. Arguably, an approach that focuses on the general normatively of international legal principles is inherently unable, or at the very least not well situated, to grasp these distinctions, unless those principles are removed from most of their substantive meaning. Therefore, Bohoslavsky and Goldmann make, in my opinion, their most valuable contributions when they discuss specific solutions to specific problems, such as the imposition of limitations to holdout litigation. Even though such a research focus does not necessarily flow naturally from the understanding of the authors about the appropriate outlook and functions of the discipline, it can produce concrete progressive solutions even without claiming alterations to the broader fabric of international law.

Human rights: powerless companions?

Interestingly, such a disciplinary understanding can also narrow down the scope of inquiry into the interplay between international law and sovereign debt. The Polanyian outlook of this approach that seeks to embed markets, including markets of sovereign debts into broader social fields, is coupled with a particular understanding of states as 'protectors of their citizens and providers of welfare'. Still, it is worth reflecting whether this conception corresponds to the realities of the modern state as embedded, amongst

other things, in the structures of international law. Boholavsky and Goldmann might refer to the conditionalities accompanying bailouts and debt restructurings, but the special issue deals with the question mostly through the conceptual vehicle of human rights. However, conditionalities have been consistently a highly-intrusive and effective method of un-doing the state as a guarantor of welfare and transforming it into a guarantor of competitive markets. After all, it is worth recalling that Polanyi himself sarcastically summarised the League of Nation's implication with the Austrian financial crisis as follows: 'The prestige of Geneva rested on its success in helping Austria and Hungary to restore their currencies, and Vienna became the Mecca of liberal economists on account of a brilliantly successful operation on Austria's krone which the patient, unfortunately, did not survive.' (p. 25) Much more modestly, Bradlow's contribution proposes mechanisms of accountability for the human rights obligations of creditors, while Bohoslavsky constructs a complex and persuasive narrative between economic inequality and economic crises, even though his straightforward conceptualisation of inequality as a human rights issue is somewhat less persuasive. Importantly, this approach does not facilitate broader reflections on the disciplining functions of debt crises and restructurings. In this context, human rights have turned out to be at best a 'powerless companion' (Moyn, p. 147): their global ascendance coincided chronologically with the debt crises of Latin America and the expansion of the role of the international financial institutions as well as with the explosion of economic inequality without them providing any significant counterweight.

Further, even though human rights might be able to rectify the very worst excesses of austerity, they are unable to counterbalance the structures of class domination and exploitation embedded in structural adjustments, the political instability that accompanies externally-imposed reform, and the macro-economic impact of shrinking GDPs, deflation or falling share of labour in national incomes. More broadly, a more systematic analysis of the effects of conditionality and debt-driven governance on states and the international system itself would not necessarily have shifted the focus of this special issue away from its rigorous combination of theory and practice. However, it could have pointed toward different articulations of the two, as well as toward a different, perhaps more critical, understanding of the role of international lawyers.

All things considered, it is impossible to summarise and comment on the extensive, insightful work that both the editors and the contributors put into this special issue. The persistence of the problem and general political unwillingness to resolve it in a minimally progressive and socially constructive manner means that this work will remain relevant for the years to come. In this context, it is worth reflecting that specific ways of combining theory and practice create different audiences and, more importantly, anchor one's academic endeavours to broader political and economic projects. In what appears to be a dawning age of great discontent, one of the biggest challenges for progressive scholars will be to anchor our work not only to 'activist governments and courts', but also (and even more importantly) to transnational social movements and to the struggles of organised labour and democratic citizenship.

Ntina Tzouvala is a Postdoctoral Fellow at Melbourne Law School.

Cite as: Ntina Tzouvala, Sovereign debt and international law, or on the intricacies of theory and practice, *Völkerrechtsblog*, 30 January 2017, DOI: 10.17176/20170206-020210.

ISSN 2510-2567

Tags: *International Economic Law* , *International Organisations*

Related

Inter-Creditor Equity in Corporate and Sovereign Debt Restructuring
1 February, 2017
In "Sovereign Debt"

Setting the Scope of and the Limits to the Incremental Approach to Sovereign Debt Restructurings
25 January, 2017
In "Sovereign Debt"

Constant Dripping Wears Away the Stone… Including Sovereign Debt
23 January, 2017
In "Sovereign Debt"

PREVIOUS POST
Putschists behind Bars?

NEXT POST
Inter-Creditor Equity in Corporate and Sovereign Debt Restructuring

No Comment

Leave a reply

Logged in as ajv2016. Log out?

SUBMIT COMMENT

Notify me of follow-up comments by email.

Notify me of new posts by email.